GAPARI KITINGAN

v.

THE ATTORNEY-GENERAL, MALAYSIA

SUPREME COURT, KUALA LUMPUR
ABDUL HAMID OMAR LP
AJAIB SINGH SCJ
MOHD. JEMURI SERJAN SCJ
[SC CIVIL APPEAL NO. 01-52 OF 1990]
14 NOVEMBER 1990

CIVIL PROCEDURE: *Depositions to be taken in Hong Kong - Order for the issue of a letter of request to Supreme Court Hong Kong - Whether O. 39 Rules of the High Court 1980 applies to criminal proceedings - Whether Rules of the High Court 1980 is a subsidiary legislation - "in relation to a matter" - Section 21(1) of the Interpretation Act 1967 - Order 66 Rules of the High Court 1980 - Section 16(1) Court of Judicature Act 1964.*

This is an appeal against the decision of the Kota Kinabalu High Court dismissing the appellant's application to set aside the *ex-parte* order given by Mohd. Noor J on 19 March 1990 granting the application by the A.G. M'sia (reported in [1990] 1 CLJ (Rep) 617) for depositions of certain persons named in the application be obtained in Hong Kong and further order for the issue of a letter of request that Court take the depositions of the said persons for the purpose of criminal proceedings instituted in Malaysia.

The question for determination is whether s. 16(a) of the Court of Judicature Act 1964 can be construed to constitute the source and enabling provision empowering the enactment of O. 39 of the Rules of the High Court 1980 (RHC) and if it can, whether O. 39 is applicable to both criminal and civil proceedings.

Held:

[1] Although O. 39 and O. 66 RHC are separate orders, both are nevertheless provision of the same RHC, a subsidiary legislation which emanates from the same source, therefore O. 66 and the effect of O. 1 r. 2(2) and (3) RHC can be relied on by the learned Judge when interpreting the scope and effect of O. 39.

[2] The word cause in O. 39 is defined to include "any action defendant and any criminal proceeding".

[3] To constitute a valid rule which would encompass not only civil but criminal proceeding such rule must be properly enacted in that it must be in accordance with and pursuant to a clear and unambiguous enabling provision of law. Section 16 of the Courts of Judicature Act (the Act) is such law.

[4] By reason of s. 16(a) of the Act definition of the word "cause" must necessarily be applicable to the Rules of Court made under the section. The same meaning must be assigned to the word "cause" in O. 39. O. 39 should therefore be applicable not only in respect of civil but also criminal proceedings. Further, by reason of the construction placed by the Court on O. 39 its scope and effect, we are firmly of the view that considered in light of s. 16(a), O. 39 must accordingly be held to be valid and properly enacted and is applicable to both civil and criminal proceedings.

[5] Consideration affecting admissibility of a deposition of any particular person subject of the order within or outside jurisdiction does not appear to be a relevant consideration to precede the making of an order under O. 39 r.(1) or (2).

[6] For the reasons above, the Judge had not erred in law and as such had acted *intra vires*.

[Appeal dismissed.]

Case referred to:
Dato' Mohamed Hashim Shamsuddin v. Attorney-General Hongkong [1986] CLJ (Rep) 89

Legislation referred to:
Courts of Judicature Act 1964, s. 16(a), (l)
Interpretation Act 1967, s. 21(1)
Rules of the High Court 1980, O. 39

For the appellant - Ronald Khoo Teng Swee (Simon Shim and Harjeet Singh with him); M/s. Shim Pang & Co.
For the respondent - Abdul Gani Patail, SFC and Ng Aik Guan, DPP

JUDGMENT

Abdul Hamid Omar LP:

This is an appeal against the decision of Haidar J sitting at Kota Kinabalu dismissing the appellant's application to set aside the *ex-parte* order given by Mohd. Noor J on 19 March 1990 granting the application by the Attorney-General, Malaysia for depositions of certain persons named in the application be obtained in Hong Kong, and further order for the issue of a letter of request to be directed to the Supreme Court of Hong Kong to request that Court to take or cause to be taken the depositions of the said persons for the purposes of criminal proceedings instituted in Malaysia. There was yet a further order which we think need not for purposes of this appeal be set out herein.

The learned Judge who heard the application to set aside the order briefly adverted to the events leading to the application made by the Attorney-General, Malaysia before referring to the main thrust of the argument made by Mr. Ronald Khoo Teng Swee, Senior Counsel for the appellant that O. 39 Rules of the High Court (RHC) does not apply to criminal proceedings.

The argument canvassed before us in this appeal directly revolves on one central issue, namely that O. 39 RHC does not apply to criminal proceedings. It is the appellant's main contention that the learned Judge was clearly wrong to rely as authority to support his decision the judgment of this Court in the case of *Dato Mohamed Hashim Shamsuddin v. Attorney-General Hongkong* [1986] CLJ (Rep) 89 as reflected in the majority decision.

The judgment in *Dato Hashim's* case turned essentially on O. 66 RHC, its validity and the property of its enactment. The Court came to a decision that s. 16(l) of the Courts of Judicature Act 1964 (the Act) is the statutory source and the enabling provision for O. 66 and that it is valid and properly enacted in relation to both the civil and criminal proceedings; hence the decision made pursuant to that order was *intra vires*.

In *Dato Hashim's* case the Court concluded that the RHC constituted a subsidiary legislation and that the phrase "in relation to a matter" in r. 1(1) of O. 66 connotes the application of that order to criminal as well as civil matters on the basis that although the word "matter" is not defined in the RHC, the RHC itself was enacted under the Act.

That Court arrived at the conclusion after considering the definition of the word "matter"

read with that of "proceeding" in s. 3 of the Act which the Court says clearly includes criminal proceedings and is applicable equally to the provisions of the RHC by virtue of s. 21(1) of the Interpretation Act 1967.

In its judgment the Court also considered the effect of O. 1 r. 2(2) and (3), in particular the effect of para. (3) of r. 2 before it turned to consider the question of the statutory source or enabling provision for the enactment of O. 66. Special reference was given to s. 16 of the Act which the Court held to be the statutory source and enabling provision for O. 66.

In our view, the situation obtaining in that case is not substantially distinguishable from that obtaining in the instant case. While in that case the Court was construing the scope and effect of O. 66, here we are concerned with O. 39. It is our view that though they are separate orders both are nevertheless provisions of the same RHC, a subsidiary legislation which emanates from the same source. We are therefore unable to see why the judgment in that case insofar as it concerns the source of the RHC, the propriety of the enactment of O. 66 and the effect of O. 1 r. 2(2) and (3) RHC cannot be relied on by the learned Judge as applicable to this case when interpreting the scope and effect of O. 39.

The question that calls for determination here is whether s. 16 of the Act, in particular para. (a) of that section can be construed to constitute the source and enabling provision empowering the enactment of O. 39, and if it can whether O. 39 is applicable to both criminal and civil proceedings.

We have heard the contention made by the appellant very ably put across by Mr. Ronald Khoo. We stress however that central in his argument is the question of the applicability of O. 39 to criminal proceedings. There were two other subsidiary points raised by Mr. Khoo. As regards those, suffice to say that we need not deal with them as, in our view, they are without merits.

To turn now to what we call the central issue in this appeal, it is our view that there is primarily a need to fully appreciate the scope and effect of O. 39 which reads:

> 1.(1) The Court may, in any cause or matter where it appears necessary for the purposes of justice, make an order in Form 73 for the examination on oath before a Judge or the Registrar or some other person, at any place, of any person.

It is abundantly clear that the crucial word in that order is the word "cause" which is defined in the Act, that is, a principal legislation. "Cause" is defined to include "any action, defendant, and any criminal proceeding." Read in the light of the definition of the words "in any cause" in O. 39, the word "cause" must necessarily be construed to include "any criminal proceeding." By so holding the question that necessarily arises for determination is the merit of the proposition that that order does not apply to a criminal proceeding.

It is our considered view that to constitute a valid rule which would encompass not only civil but criminal proceeding such rule must be properly enacted in that it must be made in accordance with and pursuant to a clear and unambiguous enabling provision of law. We think s. 16 is such law. As this section is so crucial for our consideration of this appeal it is important that we reproduce hereunder the relevant portion of s. 16(a) which reads:

> 16. Rules of Court may be made for the following purposes:
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> (a) for regulating and prescribing the procedure (including the method of pleading) and the practice to be followed in the High Court and the Supreme Court in all causes and matters whatsoever in or with respect to which those Courts have for the time being jurisdiction.

We have earlier adverted to the definition "cause" but had not referred to another word

"matter" which may be of some relevance. However upon analysis we feel it would suffice for purposes of this appeal to omit reference to the definition of that word. By reason of s. 16(a) of the Act the definition of the word "cause" must necessarily be applicable to the Rules of Court made under the section. The same meaning must be assigned to the word "cause" in O. 39. So viewed O. 39 should therefore be applicable not only in respect of civil but also criminal proceedings. By reason of the construction we have placed on O. 39 its scope and effect, we are firmly of the view that considered in the light of s. 16(a), O. 39 must accordingly be held to be valid and properly enacted and that the order is applicable to both civil and criminal proceedings.

Proceeding on the basis that O. 39 is applicable to criminal proceedings, the only remaining factor for the Court to consider before making an order is to satisfy itself that such an order is necessary for purposes of justice. It is an exercise of the Court's discretion depending on the circumstances of each case. In any event the point is not taken in this appeal and we say no more of it.

It has been suggested that at that stage when an application is made under O. 39 the Court shall have to consider the question of admissibility of the depositions. We hardly think so. Consideration affecting admissibility of a deposition of any particular person subject of the order within or outside jurisdiction does not appear to be a relevant consideration to precede the making of an order under O. 39 r. (1) or (2).

For the reasons we have stated it is our judgment that the learned Judge had not erred in law in making the order which he did. In effect the learned Judge had acted *intra vires*. Accordingly, the appeal must be dismissed. It is so ordered with costs.

Also found at [1991] 1 CLJ 247

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